UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 26

UNITED STATES COLD STORAGE, INC.
Employer

and

ROBERT JOYNER **Case 26-RD-1131**
Petitioner

and

UNITED FOOD AND COMMERCIAL WORKERS LOCAL NO. 1995[1]
Union

REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION

The Employer, United States Cold Storage, Inc., a New Jersey corporation, has offices and places of business located in Interchange City and Smyrna, Tennessee, where it is engaged in the business of public refrigeration warehousing. The Union, United Food and Commercial Workers Local No. 1995, has represented warehouse and maintenance employees of the Employer since 1997. At the pre-election hearing, the parties stipulated that the appropriate bargaining unit includes all warehouse employees, maintenance employees and leadmen employed at the Employer's Interchange City and Smyrna, Tennessee locations, and excludes all office clerical employees, professional employees,

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[1] The Union's name appears as amended at hearing.

guards and supervisors as defined in the Act. There are approximately 39 employees in the unit.

Following a hearing before a hearing officer of the National Labor Relations Board, the Employer and Union filed briefs with me. The Petitioner did not file a brief. As stated at the hearing and in the parties' briefs, this case presents the single issue of whether the petition is barred by an agreement reached by the parties. The Union contends the petition is barred by an enforceable agreement as of March 19, 2006[2] when the Employer's written offer was ratified by the Union's membership. The Employer, on the other hand, contends the petition is not barred because there was no written and signed agreement prior to the filing of the March 20 petition. At hearing, the Petitioner did not take any position with respect to the issue of a contract bar, but stated that the employees should be allowed to voice their opinion by voting on whether they wanted to be represented by the Union.

I have considered the evidence adduced during the hearing and the arguments advanced by the parties and, as explained below, I find that the agreement does not operate as a bar to the petition because it was not signed by the parties before the petition was filed.

I. FACTS

The Employer and the Union were parties to a collective-bargaining agreement that was effective from March 17, 2001 until March 18, 2005. The parties held 11 bargaining sessions for a successor agreement between March

1, 2005 and December 21, 2005. By letter dated January 13, the Employer sent the Union an offer which included certain provisions on which the parties had reached tentative agreements and others on which they had reached no agreement. The Employer's offer contained the following reservation:

> The Company reserves the right to revise, amend, add to or withdraw any proposal contained herein. Agreement on any proposal made by the Company will be contingent on the agreement by the Union to all of the items contained in this proposal.

By letter dated January 23, the Union rejected the Employer's offer with respect to three enumerated items (effective dates of the agreement, wage rates and insurance benefits) and made a counter-proposal on each. By letter dated January 27, the Employer rejected the Union's counter-offer.

In mid-March, the parties spoke twice by phone and discussed whether the Employer's offer was still open, with the Employer stating that there had been no change from its offer of January 13.[3] The record discloses that the next communication occurred on March 19, when Union Business Agent Greg Stallings left a voice-mail message for the Employer's counsel stating that the parties had reached a contract based on ratification of the Employer's offer by members of the Union. Also on March 19, another union official, Larry Buggs, notified Plant Manager Marlon Lucas that the Employer's offer had been ratified.

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[2] All dates hereafter refer to 2006 unless otherwise noted.

[3] The Employer does not dispute that its offer remained open at the time.

The following day, March 20, the Petitioner filed the instant petition at 9:07 a.m. A copy of the petition was sent to the Employer and Union, by facsimile, between 2:18 p.m. and 2:23 p.m. on that same date.

Also on March 20, the Union, by Business Agent Stallings, sent a letter to the Employer confirming that the Employer's January 13th offer was ratified by the Union's membership. The letter was sent by facsimile to the Employer at 4:55 p.m. and received by the Employer at 5:06 p.m. In the same letter, Stallings made the following statement: "I assume you will be making the necessary changes to the bargaining Agreement and then forwarding a draft for my review."

By e-mail message dated March 28, the Employer sent the Union a draft of its "proposed agreement". In that message, the Employer notified the Union that: 1) Employer officials had not yet reviewed the draft and it would not be considered "final" by the Employer until it was given "final approval" by those same company officials; and 2) by agreeing that the agreement was effective as of March 19, the Employer was not waiving its right or the right of any other party to argue that there was no contract bar at the time the decertification petition was filed.

The record establishes that no single document reflecting the agreed-upon contract terms was signed by representatives of the Employer *and* the Union prior to filing of the decertification petition. Further, there was no exchange of a written proposal and a written acceptance, both signed, prior to filing of the decertification petition.

II. ANALYSIS

The burden of proving that a contract bars a petition is on the party asserting the doctrine. *Road & Rail Services,* 344 NLRB No. 43, slip op. at 2 (2005), citing *Roosevelt Memorial Park*, 187 NLRB 517 (1970). In arguing that the contract bar doctrine applies in this case, the Union makes two arguments. First, the Union asserts that the parties had a binding, enforceable contract as of March 19 that should act as a bar to any petition filed thereafter since the Employer's offer of January 13 was ratified by the Union's membership and reduced to writing. The Employer takes the position that the agreement between the parties, if there was one, was executed after the petition was filed.

There is no dispute as to whether the Employer's offer was ratified by members of the Union,[4] but I disagree with the Union's assertion that the parties' agreement was reduced to writing before the petition was filed. While the Employer's offer was reduced to writing on January 13, the Union's written acceptance of such offer was not made until about 5:00 p.m. on March 20 when Union Business Agent Stallings notified Employer's counsel in writing that its offer had been ratified by the Union's membership. Since the decertification

[4] In its brief, the Union cites *Swift & Co.,* 213 NLRB 49 (1974), for the proposition that a report to the employer that a contract has been ratified is normally sufficient to bar a petition where the contract by its terms requires that union membership must first ratify the contract before it is deemed valid. In the cited case, since both parties signed the contract prior to ratification, the issue before the Board was whether the contractual ratification procedure was sufficient to bar an immediate election in a single plant unit. In our case, contrary to *Swift & Co.*, the parties did not sign the contract and ratification of the contract by union membership cannot serve as a substitute for the signing requirement of *Appalachian Shale Products Co.*, infra.

petition was filed at 9:07 a.m., the parties' agreement had not been "reduced to writing and signed" before the petition was filed using even the most liberal interpretation of that phrase. *J. Sullivan & Sons Mfg. Corp.*, 105 NLRB 549, 550 (1953) (for an agreement to be considered a bar, it must have been reduced to writing and signed prior to the filing of the petition sought to be barred).

Secondly, the Union argues that requiring the parties to sign an agreement in order for it to serve as a bar to a decertification petition is "inconsistent with the principles of labor law and creates undesirable public policy". The Union also argues that such a rule violates the due process and equal protection clauses of the constitution since it is not rationally related to any governmental interest. The Employer contends that current Board law does not permit an agreement that was not signed by the parties before a petition was filed to serve as a bar to the petition.

Notwithstanding the Union's arguments on this issue, the matter has been well settled by the Board. In *Appalachian Shale Products Co.*, 121 NLRB 1160, 1162 (1958), the Board eliminated any exceptions to the requirement that contracts not signed before the filing of a petition could not serve as a bar. There, the Board stated,

> It feels that after more than 20 years of contract bar policy, the parties should be expected to adhere to this relatively simple requirement, and that the creation of exceptions such as this only serve to render unduly complex a field that should not have become so involved. Accordingly, the Board adopts the rule that a contract to constitute a bar must be signed by all the parties before a petition is filed and that unless a contract signed by all the parties precedes a petition, it will not bar a petition even

> though the parties consider it properly concluded and put into effect some or all of its provisions. *Ibid.*

Based on the Board's well-settled law on this issue, I find that the Union has not met its burden of establishing a contract bar because the agreement reached by the parties was not signed before the decertification petition was filed on March 20. *Appalachian Shale Products*, 121 NLRB at 1162; *De Paul Adult Care Communities*, 325 NLRB 681 (1998).

III. CONCLUSIONS AND FINDINGS

Based on the entire record in this proceeding, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction in this case.
3. The Union claims to represent certain employees of the Employer.
4. The Union is a labor organization within the meaning of Section 2(5) of the Act.
5. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

6. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

INCLUDED: All warehouse employees, maintenance employees and leadmen employed at the Employer's Interchange City and Smyrna, Tennessee locations.

EXCLUDED: All office clerical employees, professional employees, guards and supervisors[5] as defined in the Act.

IV. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by United Food and Commercial Workers Local No. 1995. The date, time and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

A. Voting Eligibility

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill,

[5] The parties stipulated and I find that the following individuals are supervisors within the meaning of Section 2(11) of the Act: Plant Manager/Vice President Marlon Lucas, Chief Engineer David Blevins, Superintendent Larry Hall, Superintendent Tim Greer, Warehouse Supervisor Gary Hallum, Warehouse Supervisor John Pyle, Engineering Supervisor Roland Garrison, Engineering Supervisor Artie Allison, Warehouse Supervisor David Brown and Warehouse Supervisor Russ Gregson.

on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike, which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

B. Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. *North*

Macon Health Care Facility, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). This list may initially be used by me to assist in determining an adequate showing of interest. I shall, in turn, make the list available to all parties to the election, only after I shall have determined that an adequate showing of interest among the employees in the unit found appropriate has been established.

To be timely filed, the list must be received in the Regional Office, The Brinkley Plaza Building, 80 Monroe Avenue, Suite 350, Memphis, TN 38103-2416, on or before **April 24, 2006**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at (901) 544-0008 or at (615) 736-7761 or may be sent by e-mail to **Region26@nlrb.gov** **or** **Resnash@nlrb.gov**. The burden of establishing the timely filing and receipt of the list will continue to be placed on the sending party.

Since the list will be made available to all parties to the election, please furnish a total of **three** copies, unless the list is submitted by facsimile or e-mail, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

C. Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Service*s, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

V. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001. This request must be received by the Board in Washington by **May 1, 2006.** The request may not be filed by facsimile.

DATED: April 18, 2006.

/S/[Ronald K. Hooks]

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